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No. 06-300

IN THE

Supreme Court of the United States

JAMES FIELDS; TAMMANY FIELDS; STUART HABERMAN; KATHLEEN HABERMAN; ROBERT HOAGLIN; KATHIE HOAGLIN; VANESSA SHETLER,

Petitioners.

v.

PALMDALE SCHOOL DISTRICT; MICHAEL GEISSER; ARLAND ATWOOD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. RESPONDENTS IGNORE THE THIRD CIRCUIT'S EXPRESSED REJECTION OF THE NINTH CIRCUIT OPINION BELOW AND FAIL TO DISTINGUISH ANY OTHER CIRCUIT CONFLICT.

Respondents claim that the Ninth Circuit opinion does not conflict with other circuits, wholly ignoring *C.N. v. Ridgewood Board of Education,* 430 F.3d 159 (3d Cir. 2005).[1] While the Ninth Circuit found no parental right could be implicated by the actions of public schools once parents enroll their children, the Third Circuit held there must be a balancing test that weighs the importance of the parental decision alleged to have been usurped by the public school against the state interest served by the intrusion. *Id.* at 185; *see also Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000).

Justice Alito, while a member of the Third Circuit, joined the *Ridgewood* opinion which upheld a middle and high school survey that interfered to some degree with parental decision-making authority but expressly rejected the Ninth Circuit's holding in the case at bar:

> In reaching this conclusion, we do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer-Pierce* rubric "does not extend beyond the threshold of the school door." *Id.* at 1207. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer-Pierce* will now trigger only an inquiry into whether or not the parent chose to send

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[1] *Ridgewood* is neither cited nor discussed by Respondents.

> their child to public school and if so, then the claim will fail. Instead, guided by *Gruenke*, wherein this Court stressed that it is primarily the parents' right "to inculcate moral standards, religious beliefs and elements of good citizenship," 225 F.3d at 307, we have determined only that, on the facts presented, the parental decisions alleged to have been usurped by the School Defendants are not of comparable gravity to those protected under existing Supreme court precedent.

430 F.3d at 185 n.26. By not addressing *Ridgewood*, much less attempting to distinguish it, Respondents ignore the obvious direct conflict with the Third Circuit. Incredibly, they argue no conflict exists in the circuit courts. Ignoring a direct conflict does not make it disappear. The conflict is real and must be resolved by this Court.

With the exception of *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989), Respondents did not attempt to distinguish the circuit conflicts cited in the Petition. Instead, in a conclusory sentence and footnote string cite, Respondents merely refer this Court to circuit court cases cited in the Ninth Circuit opinion below. Response, p.18 & n.4.

Respondents' attempt to distinguish *Arnold* also falls flat. In *Arnold*, the Eleventh Circuit found that the constitutionally protected parental right to direct the rearing of their child can be violated where parents find public school actions "inimical to their religious beliefs or the values they wish to install in their children." *See* 880 F.2d at 313. Respondents disregard this holding to claim there is no conflict. Respondents also ignore that the Eleventh Circuit employed the balancing test that the Ninth Circuit found unnecessary. *See id.* at 314. Respondents quote from *Arnold* about public school educational programs not needing to be tailored to parents'

individual preferences[2] but exclude the next sentence of the holding concerning the obligation public schools have to address parents' demands. Response, p.19. "Instead, a *reasonable accommodation must be found* by balancing the traditional rights of parents in the rearing of their children and the interest of the state in controlling public schools." 880 F.2d at 414 (emphasis added).

Respondents emphasize the *Arnold* court's tangential discussion limiting the scope of its holding. Response, p. 19. The Eleventh Circuit clarified it was not interpreting parental rights to require schools to notify parents when their minor receives counseling about whether to carry a pregnancy to term. *Id.* That the Eleventh Circuit declined to use *Arnold* as a vehicle for balancing the competing interests of counselors, minor children and parents on the contentious subject of parental notification on pregnancy issues is of no moment to the decision before this Court.

The Response fails to undercut Petitioners' position that this Court should grant *certiorari* to resolve the Ninth Circuit's conflict with the Second, Third, Fourth, Fifth and Eleventh Circuits.

II. RESPONDENTS MISCHARACTERIZE THE SCOPE OF PETITIONERS' ASSERTED PARENTAL RIGHT WHILE MINIMIZING THE IMPACT OF THE OPINION BELOW.

Petitioner parents have forcefully yet accurately described the seriousness of letting the opinion below stand. Respondents begin and end by claiming the Petition

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[2] Petitioners do not assert otherwise. *See infra* Section II.

overstates the impact of the Ninth Circuit's opinion. In between, they set up straw man characterizations of the nature and extent of the parental rights asserted by Petitioner. Instead of engaging Petitioners' articulation of parental rights head on, Respondents quote the lower courts' characterization of Petitioners' position and other discussions of those courts.

Notwithstanding Respondents' contrary assertions, Petitioners do not argue that they possess a free-standing fundamental right to exclusive control over the introduction of sex-related information to their children. *See* Response, p.1 & 14. Petitioners argue that the *state* does not have exclusive control over the introduction of sex-related information to elementary public school children. Petitioners clearly contend that the parents' fundamental liberty interest to direct the upbringing of their children includes "the right to exclude their children from being introduced to sexually-explicit subjects by a public elementary school." Petition, p.8 n.1. Further, the parents do not argue that their rights are absolute, but that their rights cannot be simply dismissed without determining whether the asserted governmental interest justifies its interference. *Id.* at p.11; *see Ridgewood.*, 430 F.3d at 185.

Additionally, Petitioners do not generally seek to require schools to adopt sexually-explicit curricula "in accordance with their personal and religious values and beliefs," *see* Response, pp.4-5 & 7, or to "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense," *see id.* at p.7. Petitioners, as individual parents, do not seek to control the general content or substance of the speech of state educators. Neither do Petitioners advocate burdening state educational systems with an obligation to cater a curriculum for each student whose parents have a genuine moral disagreement with the school's subject matter or to permit each parent to dictate individually

what the schools teach their children. *See id.* at pp.6 & 17. The Constitution does not require such results.

The Constitution does, however, require that when state educators undertake to set up curricula or psychological studies to expose elementary school children to sexually-explicit topics, parents' moral and religious disagreements must be accommodated by permitting them a meaningful opportunity to remove their children from participation in such teaching and studies. *Cf. Arnold,* 880 F.2d at 414; *Ridgewood.,* 430 F.3d at 185*; Gruenke*, 225 F.3d at 304-307; *Moody v. Cronin,* 484 F. Supp 270, 276-277 (C.D. Ill. 1979). Despite Respondents' claims, Petitioners do not argue that parents constitutional rights "encompass a broad-based right *to restrict the flow of information* in the public schools." *See* Response, p.7 (original emphasis). Parents do, however, have a constitutional right to restrict the state's flow of sexually-explicit information to their own elementary-aged children while in public school. *Cf. Arnold,* 880 F.2d at 414; *Ridgewood,* 430 F.3d at 185*; Gruenke*, 225 F.3d at 304-307.

Moreover, Petitioners do not seek to dictate the school's timing of the introduction of such topics, *see* Response, p.4, only the ability to control their elementary school children's exposure to those topics through opting out of the objectionable portion of the curricula and studies.

Petitioners' position on the parental right to control disclosure of sensitive information has similarly been misconstrued. Respondents (and the Ninth Circuit) assert: "The parents do not allege that their children were forced to disclose private information. Their argument here is only that the survey violated their own right to make important decisions regarding the manner and timing of exposing their children to sexual matters." *Id.* at p. 7. Not so.

The complaint alleged that, with the consent of Respondents, Kristi Seymour required the elementary

students to respond to all the psychological assessment survey questions, including the sexually-explicit ones, and that the students answered them all in compliance with Seymour's instructions. The complaint asserted claims of violations of both parental rights and privacy rights.[3] Petitioner parents plainly assert "a right for families to be free from being compelled to disclose personal, sexually-explicit information to an agent of the public schools." Petition, p.8 n.1. Whether parents of elementary-aged children can assert a familial privacy right under the Constitution, which must be balanced against a public elementary school's request for compelled disclosure of personal, sexually-explicit information, is the fourth question presented in the Petition for Writ of Certiorari.

Respondents wrongly claim the scope of the fundamental liberty interest asserted by Petitioner parents cannot meet the standards articulated by this Court in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As this Court said in *Washington*, when a party asks to expand the construction of fundamental due process to include a type of right not previously found to be included, the Court must consider whether the right is one rooted in the traditions and conscience of Americans, implicit in the concept of ordered liberty, without which liberty or justice would be sacrificed. *Id.* "Our Nation's history, legal traditions, and practices" provide the "guideposts for responsible decisionmaking" that "direct and restrain" exposition of fundamental liberty interests protected by the Due Process Clause. *Id.* (citing

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[3] If Petitioners' initial complaint did not sufficiently describe the parental rights, this Court's opinion will no doubt provide guidance to ensure their first amended complaint properly states a claim upon which relief can be granted.

Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

Accordingly, such analysis is appropriate when a party seeks to expand due process protections beyond the fundamental rights and liberty interests previously recognized, such as the right to marry, the right to direct the education and upbringing of one's children, the right to use contraception, and so forth. *Washington*, 521 U.S. at 720-721. For example, in *Washington*, this Court found an insufficient historical basis for a due process-protected right to commit suicide which would include a right to have assistance in doing so. *Id.* at 723. Petitioners are not seeking to expand, but merely to be protected by the fundamental liberty interest of parents to direct the upbringing of their children, the oldest fundamental right recognized by this Court. *See* Petition, p.8 n.1. The adequacy of the historic underpinnings of that fundamental right has been well established and is simply not at issue.

The language Petitioners use to characterize the Ninth Circuit's opinion is commensurate with the gravity of the parental rights at stake. Despite Respondents' claims, Petitioners have not employed hyperbole nor embellished the facts. *See* Response, p.1. Either over the Petitioner parents' objections or without their informed consent, their seven-through ten-year-olds, for the first time in their short lives, were forced to ponder and calculate the frequency with which they had certain sexual activity and sexual thoughts, and then disclose their answers to agents of their elementary school. The questions covered the weighty topics of masturbation ("Touching my private parts too much"); sexual imagery ("Thinking about having sex."); lust ("Thinking about touching other people's private parts"); sex ("Thinking about sex when I don't want to"); sexual opportunism ("Not trusting people because they might want sex"); sexual anxiety ("Getting scared or upset when I think about sex"and "Getting upset when people talk about sex"); sex drive ("Having sex

feelings in my body"); sexual compulsions ("Can't stop thinking about sex"); and sexual assault ("Have you ever . . . Been touched by someone, on your body, that made you feel uncomfortable?"). The language of the petition is only as inflammatory as the facts of the case.

The Ninth Circuit has declared that the introduction of those topics to elementary-aged children cannot implicate the Constitution or involve the federal courts. The parents of the children subjected to those questions cannot overstate the public importance of correcting that error.

III. RESPONDENTS DEMONSTRATE THE ERROR BELOW BY RELYING ON DISPUTED FACTS OUTSIDE THE COMPLAINT TO SUPPORT AFFIRMING THE DISMISSAL.

Respondents argue their position as though the opinions below were issued after evidence was presented and findings of fact were made. The trial court granted a Rule 12(b)(6) motion to dismiss with prejudice and the Ninth circuit affirmed that ruling. It is elementary that all factual allegations in the complaint must be accepted as true when considering a Rule 12(b)(6) motion. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Respondents (and the Ninth Circuit) improperly rationalize affirming the dismissal with "facts" that either were not in the complaint or were expressly alleged to be false in the complaint.

Respondents' Statement of the Case contains "facts" that are inconsistent with Petitioners' averments in the complaint. The letter seeking consent for a study, attached as Exhibit "A" to the complaint, was also alleged in paragraphs 28-30 and 34 of the complaint to have been false, incorrect, an inaccurate disclosure, deliberately incomplete, and containing

misrepresentations as to the nature and content of the psychological assessment survey. Nevertheless, Respondents cite assertions from the letter as though they were established facts that this Court should consider in its deliberations. *See* Response, pp.1-2 & 23-25.

For instance, the complaint states that the Palmdale School District's claim it was administering the psychological assessment survey as a "collaborative effort" with the California School of Professional Psychology was false and was made for the purpose of deceiving Petitioners about the true study sponsor and obtaining parental consent under false pretenses. *Compare* Response, p.1. Respondents adopt the false letter's version of the purpose and goal of the study, as well as its version of the use the District would make of the information disclosed. *Id.* at pp.1 & 24-25. Respondents ignore the complaint's allegations concerning the letter to assert that "the consent form informed the parents of the questionnaire's nature and purpose." *Id.* at p.2.

The School District responded to Petitioners' declaration of Ninth Circuit error in reviewing a dismissal by quoting the Ninth Circuit's opinion and blaming Petitioners' predecessor counsel. *Id.* at p.22-23. The quoted portion of the opinion actually highlights the Ninth Circuit error. In an alternative holding, the Ninth Circuit considered whether the School District's actions met a rational basis test notwithstanding contrary allegations in the complaint. The Ninth Circuit claimed justification in ignoring the complaint's allegations because they were speculative, conclusory and lacked facts offered in support. *Fields*, 427 F.3d at 1209. Under those circumstances, the harshest result one would expect would be entry of an order of dismissal with leave to amend. The Ninth Circuit recognized the general appropriateness of such a result but declined to order it nonetheless.

> Although in other circumstances we might dismiss such an allegation with leave to amend, it is apparent here that such a dismissal could not in the end aid the parents in stating a claim. Attached to the complaint is detailed information setting forth the legitimate governmental purpose of the survey and explaining with specificity how the information obtained will be used for educational purposes and how it will ultimately benefit the School District and its children.

Id. at 1209. Then, without qualification, the Ninth Circuit relied upon the contents of the very letter alleged to be untrue as "establishing the legitimacy of the School District's action." *Id.*

There can be no clearer error when a fact in direct conflict with the complaint can be found to be "established" for purposes of affirming a dismissal without leave to amend.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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